UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

ESTER HERNANDEZ, Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 98B00090
ALLIED INSURANCE, Respondent	)	Judge Robert L. Barton, Jr.

ROSA GONZALES, Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 98B00091
ALLIED INSURANCE, Respondent	)	Judge Robert L. Barton, Jr.

ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT'S MOTION FOR SUMMARY DECISION

(March 24, 1999)

I. INTRODUCTION

On February 22, 1999, Respondent filed a motion to dismiss. For the reasons discussed below, I am treating this motion as a Motion for Summary Decision, however, pursuant to the Rules of Practice and Procedure for Administrative Hearings, 64 Fed. Reg. 7066, 7078-79 (1999) (to be codified at 28 C.F.R. § 68.38) (hereinafter cited as 28 C.F.R. § 68.38).[1] This Motion centers around Respondent's allegations that Complainants did not timely file their complaints with the Office of the Chief Administrative Hearing Officer (OCAHO). Essentially, Respondent asserts that Complainants

[1] Certain portions of Part 68 of Title 28 of the Code of Federal Regulations have been amended. References to those amended portions of Part 68 are to the interim rule published in the Federal Register at Vol. 64, no. 29, page 7066. References to those portions not affected by the interim rules are to the 1998 volume of the Code of Federal Regulations.

did not file their complaints within the required ninety (90) days after receipt of notice from the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) that it would not be filing such complaints. The main issues of this Order are:

(1) whether Respondent has demonstrated that there are no genuine issues of material fact in these cases, and

(2) whether Respondent has demonstrated that it is entitled to judgment as a matter of law.

For the reasons discussed below, I find that Respondent has demonstrated that there are no genuine issues of material fact and that it is entitled to judgment as a matter or law in regard to Complainant Gonzales. Conversely, I find that Respondent has not established an absence of genuine issues of material fact in regard to Complainant Hernandez, and thus, is not entitled to judgment as a matter of law.

II. BACKGROUND AND PROCEDURAL HISTORY

Complainants filed charges with the OSC on July 15, 1997. See Compls. at 1; Answer ¶ 2. The record reflects that Complainants also filed charges with the EEOC by a letter dated September 15, 1997. See Att. Letter to Compls. On September 11, 1998, Complainants filed separate complaints with OCAHO alleging that Respondent discriminated against them on the basis of their national origin. See Compls. at 1. Essentially, Complainants allege that they were knowingly or intentionally fired because of their national origin. See id. at 4.

Respondent filed a letter in response to Complainants' complaints on October 21, 1998. During the November 19, 1998, prehearing conference, I ordered Respondent to submit an answer that responded to the specific allegations contained in the complaints. I also consolidated the Complainants' cases pursuant to OCAHO Rules of Practice and Procedure, 28 C.F.R. § 68.16 (1998), and Federal Rule of Civil Procedure 42(a). On December 10, 1998, I received a notice of appearance from Respondent's attorney, along with an answer and a motion to dismiss.

In its answer, Respondent enumerated the following two affirmative defenses to the complaint: (1) Complainants failed to file their complaints with OCAHO within ninety (90) days after receiving notice from the OSC informing them of their right to file such complaint, and (2) Complainants also filed charges with the EEOC based upon the same facts as the OSC charge, and therefore, Complainants are precluded from filing immigration-related unfair employment practices claims. See id. ¶ 12, 13. Additionally, in its motion to dismiss, Respondent requested that the complaints be dismissed because they failed to state claims upon which relief can be granted due to the EEOC charge filed by Complainants. See Mot. Dismiss at 2.

In an order extending the time Complainants had to respond to Respondent's motion to

dismiss, I also directed Complainants to file and serve on Respondent's attorney, copies of any correspondence received from the EEOC in regard to their EEOC filed complaints. Additionally, Ms. Gonzales was ordered to state whether she received notice from the OSC of her right-to-sue on April 7, 1998, and, if not, on what date she received such notice. Ms. Hernandez was ordered to state whether, and on what date, she received notice from the OSC, and, if she had the receipt, to provide a copy.

On January 6, 1999, I received a copy of a letter from Complainants addressed to Respondent's attorney, with an attached copy of a certified return receipt card. This was not considered to be a response to Respondent's motion to dismiss. However, for the reasons stated in the January 20, 1999, Order Denying Respondent's Motion to Dismiss, I found that OCAHO did not lack jurisdiction over these cases pursuant to 8 U.S.C. § 1324b(b)(2) due to Complainants' EEOC filed complaints. In a separate January 20, 1999, Order, I directed the parties to file all dispositive motions not later than February 22, 1999.

On January 14, 1999, my office received correspondence dated January 12, 1999, from Jose Ruiz, who identified himself as the President of the League of United Latin American Citizens (LULAC). Neither Mr. Ruiz nor his organization were complainants in these proceedings. In regard to the date that Complainant Hernandez received notice from the OSC, the correspondence included an assertion that she "did not receive her mail due to personal problems, lack of compatibility with her husband ... and a change of address." See LULAC Letter at 1. Mr. Ruiz also attached copies of certified return receipt cards addressed to Complainant Hernandez and copies of the right-to-sue letter which indicate that the letters were returned and re-sent to her on several occasions. No mention of the date Complainant Gonzales received her OSC notice is made in the January 12, 1999, correspondence. However, Complainant Gonzales attached a copy of a certified return receipt card to her OCAHO complaint that indicates she did receive such notice on April 7, 1998. See Compl.

In a separate order issued on January 20, 1999, I directed Mr. Ruiz to enter a notice of appearance if he wished to represent the Complainants in the above-stated cases. I also warned him that the January 14, 1999, communication would be rejected if he did not file such notice of appearance before February 5, 1999. On February 5, 1999, I received correspondence from Mr. Ruiz indicating that he did wish to represent the Complainants in these proceedings and I accepted this correspondence as Mr. Ruiz's entry of appearance.

On February 22, 1999, my office received Respondent's motion to dismiss based upon Respondent's assertion that Complainants did not file their complaints with OCAHO within ninety (90) days after receipt of the OSC's right-to-sue letter. More specifically, Respondent asserts that Complainant Gonzales received notice from the OSC on April 7, 1998. Since Complainant Gonzales filed her OCAHO complaint on September 11, 1998, long after July 7, 1998 (Respondent's asserted deadline for filing the OCAHO complaint), her complaint was untimely. With regard to Complainant Hernandez, Respondent asserts that "because it also appears that the Complaint of Ester Hernandez was filed after the applicable deadline, Respondent moves that the Complaint of Ester Hernandez also

be dismissed as a matter of law." See Mot. Summ. Dec. at 3. For the reasons discussed below, I am treating Respondent's motion as a Motion for Summary Decision.

III. STANDARDS GOVERNING THIS DECISION

As stated above, Respondent has filed a Motion to Dismiss asserting that the Complainants did not file their complaints with OCAHO within the ninety (90) day period after receiving notice of their right-to-sue from the OSC. Courts have held that filing periods such as the ninety-day requirement at issue in this instance, are not jurisdictional, but more akin to a statute of limitations defense. For instance, in Mohasco Corp. v. Silver, 447 U.S. 807 (1980), the Supreme Court noted that the plaintiff in a Title VII case filed his action 91 days after receiving a right-to-sue letter from the EEOC. See id. at 811. If the Court had considered the 90-day time period at issue to be jurisdictional, it would have dismissed the action sua sponte. However, the Court merely noted that "[p]etitioner did not assert respondent's failure to file the action within 90 days as a defense." Id. at 811 n.9.

Federal circuit courts have found that a parallel Title VII filing period for filing a charge with the EEOC "is a statutory requirement for presentation of the claim, and failure to do so admits a defense analogous to a statute of limitations." Sessions v. Rusk State Hosp., 648 F.2d 1066, 1069-70 (5th Cir. 1981) (citing Oaxaca v. Roscoe, 641 F.2d 386, 390 (5th Cir. 1981)). In addition, OCAHO precedent establishes that "[t]he 90-day deadline for filing a § 1324b complaint is not jurisdictional, but is rather in the nature of a statute of limitations..." Soto v. Top Industrial, Inc., 7 OCAHO 1210, 1217 (Ref. No. 999) (1998), 1998 WL 746020, at *5. Thus, the 90-day filing period will be considered as a statute of limitations defense.

Statutes of limitation are considered to be affirmative defenses. See Williams v. Runyon, 130 F.3d 568, 573 (3rd Cir. 1997). Respondent also considers the 90-day filing period to be an affirmative defense since failure to file within the 90-day period is listed as an affirmative defense in its answer. See Answer ¶ 13. Many cases state that affirmative defenses must be asserted in a defendant's answer and cannot be the basis for a motion to dismiss the complaint. CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1277, at 461-62 (2d ed. 1990 & Supp. 1998); In re Jackson Lockdown/MCO Cases, 568 F. Supp. 869, 886 (E.D. Mich. 1983). However, other courts follow the rule that all affirmative defenses may be presented by such motions. WRIGHT & MILLER, supra, at 463; Hartmann v. Time, Inc., 166 F.2d 127, 131 n.3 (1948).

The Fifth Circuit has held that, "[t]he defense of the statute of limitations may be raised by a motion to dismiss if it is affirmatively shown from the complaint that the cause of action is barred by the applicable statute of limitations..." Harrison v. Thompson, 447 F.2d 459, 460 (5th Cir. 1971). Further,

> [w]hen there is no disputed issue of fact raised by an affirmative defense, or the facts are completely disclosed on the face of the pleadings, and nothing further can be developed by pretrial discovery or a trial on the issue, the recent cases seem to agree that the matter may be disposed of by a motion to dismiss.

WRIGHT & MILLER, supra, at 468; Gordon v. National Youth Work Alliance, 675 F.2d 356, 360 (D.C. Cir. 1982) .

Here, the statute of limitations defense cannot be disposed of on the face of the pleadings. Respondent submits material outside the pleadings for consideration of its Motion to Dismiss. An affirmative defense may not be raised in a motion for dismiss when the issue cannot be disposed of on the pleadings, however, it can be raised in a motion for summary judgment. "When it is necessary to go outside the pleadings to establish or defend against a motion raising an affirmative defense, it can be done on a motion for summary judgment." WRIGHT & MILLER, supra, at 472. Consequently, I am converting Respondent's Motion to Dismiss into a Motion for Summary Decision in order to dispose of this affirmative defense. Pursuant to 28 C.F.R. § 68.38, summary decision standards will govern this decision.

The OCAHO Rules authorize Administrative Law Judges (ALJs) to "enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c). This OCAHO Rule is similar to Federal Rule of Civil Procedure 56(c), which provides for summary judgment in cases before federal district courts. Thus, although OCAHO does have its own procedural rules for cases arising under its jurisdiction, ALJs may reference analogous provisions of the Federal Rules of Civil Procedure and federal case law interpreting them for guidance in deciding issues based on the rule governing OCAHO proceedings. As such, Rule 56(c) and federal case law interpreting it are useful in determining whether summary decision is appropriate under the OCAHO Rules. See United States v. Aid Maintenance Co., 6 OCAHO 810 , 813 (Ref. No. 893) (1996), 1996 WL 735954, at *3, (citing MacKentire v. Ricoh Corp., 5 OCAHO 191, 193 (Ref. No. 746) (1995), 1995 WL 367112, at *2, and Alvarez v. Interstate Highway Constr., 3 OCAHO 399, 405 (Ref. No. 430) (1992), 1992 WL 535567, at *5; United States v. Tri Component Product Corp., 5 OCAHO 765, 767 (Ref. No. 821) (1995), 1995 WL 813122, at *3 (citing same).

As stated above, in deciding whether to grant a summary decision, I must decide if there are genuine issues of material fact in question. For this purpose, a fact is material if it might affect the outcome of the case. See Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). Additionally, an issue of material fact must have a "real basis in the record" to be genuine. Tri Component, 5 OCAHO 765, 768 (1995) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986)).

The party requesting summary decision carries the initial burden of demonstrating the absence of any genuine issues of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In

determining whether that burden has been met, all evidence and inferences to be drawn therefrom are to be viewed in a light most favorable to the non-moving party. See Matsushita, 475 U.S. at 587 (1986). Additionally, the moving party has the burden of showing that it is entitled to a judgment as a matter of law. See United States v. Alvand, Inc., 1 OCAHO 1958, 1959 (Ref. No. 296) (1991), 1991 WL 717207, at * 1-2 (citing Richards v. Neilsen Freight Lines, 810 F.2d 898 (9th Cir. 1987)). More specifically, the moving party is entitled to summary judgment "[w]hen the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Matsushita, 475 U.S. at 587 (1986).

After the moving party has met its initial burden, the burden then shifts to the non-moving party to set forth "specific facts showing that there is a genuine issue for trial." Tri Component, 5 OCAHO 765, 768 (1995) (quoting Fed. R. Civ. P. 56 (e)). Thus, when a motion for summary decision is supported and the moving party has met its initial burden, the non-moving party cannot rely on denials contained within the pleadings in opposing the motion. The Code of Federal Regulations specifically provides the following:

> [w]hen a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of such a pleading. Such a response must set forth specific facts showing that there is a genuine issue of fact for the hearing.

28 C.F.R. § 68.38(b). If the non-moving party fails to provide such specific facts, summary decision, if appropriate, shall be granted against the non-moving party. See id.; Fed. R. Civ. P. 56(e).

IV. ANALYSIS

The statutory provision relevant to this Motion for Summary Decision provides that a person making an immigration-related unfair employment practices claim must file his or her complaint with OCAHO within ninety (90) days after receiving the right-to-sue letter from the OSC.

> If the Special Counsel, after receiving such a charge respecting an unfair immigration-related employment practice which alleges knowing and intentional discriminatory activity or a pattern or practice of discriminatory activity, has not filed a complaint before an administrative law judge with respect to such charge within such 120-day period, the Special Counsel shall notify the person making the charge of determination not to file such complaint during such period and the person making the charge may (subject to paragraph 3) file a complaint directly before a judge within 90 days after the receipt of notice.

8 U.S.C. § 1324b(d)(2)(1994) (emphasis added). Thus, Complainants in section 1324b cases are required to file their complaints within 90 days after receipt of notice from the OSC that the 120-day investigatory has elapsed. See Pan v. Jude Engineering, Inc., 4 OCAHO 496, 508 (Ref. No. 648) (1994), 1994 WL 482545, at *9.

As previously established, this 90-day filing period is likened to a statute of limitations and is considered to be an affirmative defense. As such, in Title VII actions, the party raising the defense has the burden of proof. See Donnelly v. Yellow Freight System, Inc., 874 F.2d 402, 411 (7th Cir. 1989), aff'd 494 U.S. 820 (1990). Thus, the first issue presented in this Motion for Summary Decision is whether Respondent has met its burden of proving that Complainants did not timely file their Complaints with OCAHO by establishing that there are no genuine issues of material fact in dispute. Even if Respondent meets such burden, it still must establish that it is entitled to judgment as a matter of law.

A. Complainant Rosa Gonzales

Respondent has shown that Complainant Gonzales did not timely file her Complaint and that there are no disputed issues of material fact relevant to the disposition of such issue. With its Motion for Summary Decision, Respondent submits copies of notices the OSC sent to Complainants which are dated April 1, 1998. Also attached to such Motion is a copy of a certified return receipt card indicating that Complainant Gonzales received notice from the OSC on April 7, 1998. See Exh. B. Complainant Gonzales does not dispute that she received such notice on April 7, 1998.

Pursuant to 8 U.S.C. § 1324b(d)(2), Complainant Gonzales had 90 days from April 7, 1998, to file such complaint, or until approximately July 6, 1998. However, it is undisputed that she actually filed such Complaint on September 11, 1998. See Compl. at 1. Because the parties do not dispute the date Complainant Gonzales received her right-to-sue letter, there is no genuine issue of material fact regarding such date. See Pan, 4 OCAHO 496, at 506.

Further, section 1324b(d)(2) clearly states that a person filing a complaint with OCAHO must do so within 90-days after receipt of that right-to-sue letter. See Soto, 7 OCAHO 999, at 1216. ("The express language of § 1324b requires [complainant] to file her OCAHO complaint within 90 days after receipt of notice from the OSC that the 120-day investigatory and exclusive complaint-filing period had elapsed."); Sessions, 648 F.2d. at 1069 (finding that in a Title VII claim, the complaint must be filed within ninety days of receipt of the right-to-sue letter). Thus, Respondent has also established that it is entitled to judgment as a matter of law with respect to Complainant Gonzales.

B. Complainant Ester Hernandez

Conversely, Respondent does not establish an absence of genuine issues of material fact in regard to Complainant Hernandez's complaint. Respondent maintains that the burden is on Complainant Hernandez to establish that she did not receive the OSC right-to-sue letter until a much later date than April 7, 1998. It states, "[w]ith regard to Ester Hernandez, it is undisputed that her Complaint was not filed until September 11, 1998, which would also render such Complaint untimely, unless Ester Hernandez can establish that she did not receive notice from Special Counsel until a date much after April 1, 1998." R's Mot. Summ. Dec. at 2. However, as established previously, Respondent bears the burden of pleading and proving this affirmative defense. See Williams, 130

F.3d at 573.

There is a factual issue concerning the date Complainant Hernandez received her right-to-sue letter. Respondent submitted copies of the OSC notice dated April 1, 1998. However, Respondent does not establish when Complainant Hernandez received her copy of the OSC notice. Unlike the Gonzales scenario, Respondent does not submit a certified return receipt card, or any other evidence pertaining to such date. In fact, Complainant Hernandez disputes that she ever received such notice. See Letter of Jan. 12, 1999. She submitted documents that indicate the OSC re-sent such letter several times after it was returned by the postal service. These documents indicate that the notice was last sent or attempted to be delivered on July 11, 1998. See Hernandez Cert. Return Rec. Card.

Regardless of the information contained in these submitted documents, however, Respondent does not meet its burden of proving that Complainant Hernandez did not file her complaint within 90 days after receipt of the right-to-sue letter. Thus, Respondent has not established an absence of a genuine issue of material fact in regard to when Complainant Hernandez received her right-to-sue letter from the OSC. Thus, disposition of such issue is impossible under a Motion for Summary Decision, and Respondent is not entitled to judgment as a matter of law.

V. CONCLUSION

For the foregoing reasons, I find and conclude the following:

1. Respondent's Motion for Summary Decision is granted in regard to Complainant Gonzales;

2. Respondent's Motion for Summary Decision is denied in regard to Complainant Hernandez.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

NOTICE CONCERNING APPEAL

With respect to Complainant Gonzales only, this order is a final order. As provided by

statute, not later than 60 days after entry of a final order, a person aggrieved by such order may seek a review of the order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business. See 8 U.S.C. § 1324b(i); Rules of Practice and Procedure for Administrative Hearings, 64 Fed. Reg. 7066, 7083 (1999) (to be codified at 28 C.F.R. § 68.57).

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March, 1999, I have served the foregoing Order

Granting In Part and Denying In Part Respondent's Motion for Summary Decision on the following persons at the addresses shown, by first class mail, unless otherwise noted:

Ms. Rosa Gonzales
1502 Goldenrod
Amarillo, TX 79107

Ms. Esther Hernandez
4615 S. Virginia #5B
Amarillo, TX 79109

Jose F. Ruiz, President
League of United Latin American Citizens Council #4427
P.O. Box 733
Amarillo, TX 79105
(Representative for Complainants)

Brian P. Heinrich, Esq.
Templeton, Smithee, Hayes, Fields, Young & Heinrich
320 S. Polk, Suite 1000
Maxor Building, LB-5
Amarillo, TX 79101
(Counsel for Respondent)

John D. Trasvina
Special Counsel for Immigration-Related
Unfair Employment Practices
P.O. Box 27728
Washington, D.C. 20038-7728

Office of the Chief Administrative Hearing Officer
Skyline Tower Building
5107 Leesburg Pike, Suite 2519
Falls Church, VA 22041
(hand delivered)

_____

Linda Hudecz
Legal Technician to Robert L. Barton, Jr.
Administrative Law Judge
Office of the Chief Administrative Hearing Officer
5107 Leesburg Pike, Suite 1905
Falls Church, VA 22041
Telephone No.: (703) 305-1739
FAX NO.: (703) 305-1515